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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF THE PETITION OF CITY OF CHICAGO FOR WRIT OF CERTIORARI

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MOTION OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National Urban League and its affiliate the Chicago Urban League ("League") move the Court for leave to file the attached brief in support of the petition of the City of Chicago for a *writ of certiorari* to the United States Court of Appeals for the Seventh Court, which petition was filed with this Court on June 27, 1993. The petitioner has consented to the League's brief; respondent has not consented.

I.

NATURE OF APPLICANT'S INTEREST

At issue in this case is whether the Seventh Circuit will be allowed to supplant precedent with its own amorphous standard of constitutional review of affirmative action programs. The outcome of this case will be determinative of the guidelines for governmental affirmative action in employ-

ment and contracting, and of the ultimate and material impact of those guidelines on the employment opportunities available to millions of workers in the United States.

The National Urban League was founded in 1910. The Chicago Urban League, the largest of 113 affiliates, was founded in 1916 and is Chicago's oldest and largest race relations organization. The League addresses local and national issues that affect the lives of African Americans, other minorities, and the poor. The League works for the adoption of public policies that will benefit its constituents.

To this end, the League maintains an active role in designing, strengthening and monitoring affirmative action programs locally and nationwide. Yet, the League does not seek to file as *amici curiae* every time an affirmative action program is either challenged or struck down. Rather, it is the circumstances of this case — namely, the Seventh Circuit's attempt to establish a new and unattainable standard for constitutionally permissible race-based remedial programs — which require the League to join with other organizations to request that *certiorari* be granted.

II.

THE LEAGUE IS IN A UNIQUE POSITION TO ADVANCE THE REASONS THIS COURT SHOULD GRANT CERTIORARI

In deciding whether to grant *certiorari* in this case, the Supreme Court should hear not only from the petitioner and respondent, but also from those organizations which have for decades sought to move this country forward in the area of racial equity. For more than 80 years the League has been actively involved in the struggle to assure fair and equitable employment opportunities for all Americans regardless of race or ethnicity. Since its inception, the League has operated employment and training programs and has been a

strong advocate for public and private policies designed to promote fair and equitable hiring and promotional policies nationwide. And for decades, the League has conducted research and documented the tragic results on the lives of minorities when quality jobs are not accessible due to discrimination.

We now find that, in the wake of the Seventh Circuit's decision in *Billish v. City of Chicago*, decades of national consensus-building as to the constitutional parameters of affirmative action programs have been jeopardized. If allowed to stand, the inevitable result of the Seventh Circuit's decision will be the wrongful undoing of the hard-won gains of hundreds of thousands of minorities who seek access to the American dream.

The perspective offered by the League is necessarily different from that offered by the governmental defendants in this action. The League's interests and those of its constituents extend beyond the particular program challenged by respondents to include programs in public sector contracting and employment both in Chicago and nationwide. These interests are jeopardized by the Seventh Circuit's adoption of amorphous criteria — criteria which, if followed, would lead to the invalidation of all existing affirmative action programs. The League's experience in the monitoring, development and assessment of affirmative action programs contributes to the organization's unique expertise in the matters at issue in this action and to its ability to evaluate the Seventh Circuit's opinion in its broadest and most practical context.

III.

CONCLUSION

For the foregoing reasons, the National Urban League and Chicago Urban League respectfully move the Court for leave to file the attached brief as *amici curiae* in support of the petition of the City of Chicago for a *writ of certiorari.*

Respectfully submitted,

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QUESTION PRESENTED

Whether this Court should grant petitioners a *writ of certiorari* to determine whether the Seventh Circuit's strict scrutiny analysis of the petitioner's affirmative action program is consistent with the decisions of this Court.

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BRIEF OF NATIONAL URBAN LEAGUE AND CHICAGO URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF THE PETITION OF CITY OF CHICAGO FOR WRIT OF CERTIORARI

I.

INTEREST OF THE AMICI CURIAE

For countless decades, this country has wrestled with the pernicious legacy and ongoing disgrace of discrimination in hiring and promotions. Barriers to employment based on racial and ethnic discrimination continue to impede economic advancement for millions of Americans.

The National Urban League and Chicago Urban League ("League") have had a long-standing commitment to achieving racial and ethnic parity throughout all aspects of American society. To this end, the League has long been an advocate for fair and effective affirmative action programs to

remedy the effects of discrimination in employment. The League's membership includes a diverse constituency of labor, businesses and civic organizations all of whom understand the role that such programs play in the eradication of inequality.[1]

II.

SUMMARY OF ARGUMENT

This Court has continued to recognize the existence of racial discrimination in hiring and promotions, and has time and again affirmed the appropriateness of governmental bodies implementing race-based remedial policies as corrections to such practices. In 1989 this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), established a strict scrutiny standard for the constitutional review of affirmative action programs. Since then, federal courts have applied that standard consistently; some programs have been struck down, while others have withstood this heightened scrutiny. The interests of all parties to such programs are advanced when precedent is consistently adhered to and there is no confusion among the circuits, as is now the case.

This confusion has been created by the Seventh Circuit's ruling in *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993). The Seventh Circuit has jeopardized the existence of not only the Chicago Fire Department's affirmative action program, but of all affirmative action programs nationwide by establishing new criteria for constitutional review. Because other local governments have implemented similar if not identical remedial policies, the impact of this case will reach far beyond the two litigants. The League urges the Supreme Court to grant Petitioners a *writ of certiorari* from the Seventh Circuit's opinion in order to prevent the Sev-

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[1] The interests of the National Urban League and Chicago Urban League is more fully set forth in the motion for leave to file.

enth Circuit from inappropriately redefining the standard for review of governmental affirmative action programs, and wiping away years of wise, fair and sensitive public policy. The League speaks for millions of Americans in this effort to convince the Court to grant *certiorari* and reverse the Seventh Circuit.

III.

ARGUMENT

A. Croson Provides the Proper Standard of Review

Croson finalized two decades of evolving Court opinion as to the proper standard for legal review of government-operated affirmative action programs by establishing a strict scrutiny standard for such programs. Since *Croson*, federal courts have used this standard as the basis for reviewing affirmative action programs. At times, programs have been struck down for failing to meet strict scrutiny requirements. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (lack of predicate). Programs have also been upheld, again under the same standard of review. *See Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990) (County had a strong basis for conclusion that affirmative action was necessary and plan was narrowly tailored); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 875 (1992) (predicate existed, narrow tailoring achieved); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1948 (1992) (race-conscious relief justified by compelling state interest and relief was narrowly tailored). Overall, because *Croson* set forth a clear standard for review, and because the federal courts have correctly and consistently applied that standard, local governments have been able to proceed with public policies designed to remedy

discrimination by constructing programs that are within the bounds of the Constitution. As a result, barriers to minority advancement have been removed.

However, in *Billish*, the Seventh Circuit departed from this Court's standard of review and its application by lower courts by fashioning its own rules for determining the constitutionality of race-based remedial policies; this analysis has no grounding in twenty years of this Court's evolving positions culminating in *Croson*. If the decision in *Billish* is allowed to stand, then affirmative action programs nationwide are at risk for being found unconstitutional, not through any failure to satisfy strict scrutiny, but through the application of new and amorphous criteria created by the Seventh Circuit. The Seventh Circuit's criteria include maneuvering between Fourteenth Amendment and Title VII analyses, ascribing wrongful motives to governments seeking to remedy discrimination, ignoring a governmental body's fundamental interest in remedying the ongoing effects of past discrimination, and questioning the very validity of affirmative action policies adopted in a good-faith attempt to redress harm caused by a government's own discriminatory practices. *Billish, 989 F.2d* at 895-97. This deviation from *Croson* and departure from other federal circuits will undercut the standing of all affirmative action programs in this nation, and will return this country to the days when equal opportunity in public employment was left to the good graces of the employer.

The proper review for affirmative action cases is an equal protection review. *See Croson*, 488 U.S. at 467-77; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). This review begins with the acknowledgment that a governmental body has a fundamental interest in remedying the effects of the discriminatory barriers that it has created through its hiring and promotional practices. *Wygant*, 476 U.S. at 287; *United States v. Paradise*, 480 U.S. 149, 167 (1987). The

Court is "in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose." *Wygant*, 476 U.S. at 287; *See also Paradise*, 480 U.S. at 166; *Croson*, 488 U.S. at 491-92. This Court has consistently held to the position that, when properly designed, such policies are legitimate uses of a government's powers to rectify discriminatory practices, *see Paradise*, 480 U.S. at 166; *Croson*, 488 U.S. at 491-92, and that governments are not confined to simply implementing race-neutral prospective relief. *Paradise*, 480 U.S. at 173-74.

Thus, a proper analysis of race-specific remedial policies does not require, as would the Seventh Circuit, an inquiry as to whether or not such policies have a valid role to play in this country's efforts to eliminate racial discrimination in public sector employment. *Billish*, 989 F.2d at 897. ("There is concern and resentment about the use of policies of affirmative action or [more bluntly] reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons.") As this Court has time and again concluded, the affirmative actions policies do have an important and constitutionally valid remedial role. Citing the "concern and resentment about affirmative action programs amounts to improperly blaming the victim for the cost of a valid remedy.

The decisions in *Wygant* and *Croson* make it clear that the Seventh Circuit failed to apply the proper standard of review of the policies in question and instead chose to undercut this Court's steadfast commitment to the propriety of governmental action aimed at eradicating past and present discriminatory barriers in employment. Thus, this Court's review of the case at hand should be no different than what the Seventh Circuit's review should have been: this Court should evaluate, using an equal protection analy-

sis, whether the Chicago Fire Department's (CFD) race-based remedial promotional policies can be shown to be predicated in factual instances of discriminatory practices and can be shown to be narrowly tailored to redress only those discriminatory practices known to the CFD. *Wygant*, 476 U.S. at 277, 285; *Croson*, 488 U.S. at 499-500, 507. This Court should not, as did the Seventh Circuit, question the very validity of such public policies in American society. The remainder of this amici brief will show how the CFD's actions clearly pass this Court's standard for constitutional review; to find otherwise would lead to the evisceration of not only this affirmative action program, but countless other well-crafted, sensitive and sensible programs nationwide.

B. Governments Must be Allowed to Use Properly Constructed Statistical Showings of Disparities as Predicates for Affirmative Action Programs

The CFD designed its affirmative action program in ways that are consistent with *Croson* guidelines. The CFD established a *prima facie* case of discrimination by providing both anecdotal and statistical evidence of discrimination that established that the gross disparities between the racial compositions of the relevant labor pools for the jobs at issue and the racial composition of the holders of those jobs were due to discrimination.[2] In addition to providing initial evi-

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[2]In his letters to Commissioner Galante, Personnel Commissioner Hoskins provided ample testimony about the racially biased nature of CFD testing. In addition, the City repeatedly performed statistical analyses of hiring and promotions. For example, the City found that the difference between the expected percentage of minority engineers and the actual percentage was 8.7 standard deviations, and the difference between the expected and actual percentage of minority captains was 3.96 standard deviations. *Chicago Fire Fighters v. Washington*, 736 F. Supp. 923, 930 (N.D. Ill. 1990), *rev'd on other grounds*, 989 F.2d 890 (7th Cir. 1993). "A range of four to five standard deviations corresponds to a probability range of 1 chance in 15,786 to a 1 chance in 1,742,160."

dence of discrimination, the CFD followed Court guidelines and revisited the issue over time. The CFD concluded that further affirmative action was necessary in order to remedy the continuing discriminatory effects on advancement opportunities for minorities resulting from past and present discrimination.[3]

However, despite the CFD's findings that it discriminated in the past, the consent orders in which the CFD agreed to employ affirmative action programs as a remedial measure, and the great disparity between the percentage of minorities in the rank of firefighter and the higher ranks, the Seventh Circuit wrongly discounted the evidence as failing to constitute a disparity relevant to the showing of discriminatory practices in promotions at the CFD.

First, the Seventh Circuit incorrectly dismissed the labor pool used for comparison in the engineer promotions — the position of firefighters — as failing to constitute the relevant, qualified labor pool. *Billish*, 989 F.2d at 896-97. The court's reasoning in doing so was flawed. The Seventh Circuit hypothesized that the

> larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree. *Id.* at 896.

Ottaviani v. State Univ., 875 F.2d 365, 372 n.7 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Therefore, the numbers presented by the City fall well outside the realm of chance and, for purposes of establishing an affirmative action plan, provide the City with the "strong basis" needed to establish a race-specific remedial program. *See Croson*, 488 U.S. at 500.

[3]Personnel Commissioner Hoskins' letters to Commissioner Galante citing the need for continued affirmative action in order to overcome continuing effects of discrimination. *See Chicago Fire Fighters*, 736 F. Supp. at 925.

The Circuit goes on to speculate that this high percentage of firefighters may not only be an "artifact" resulting from a hiring quota in the previous decade, but that it came about through a hiring quota that the CFD implemented by lowering its standards in order to increase minority representation in the rank of firefighter. *Id.* at 896. Thus, since in the Seventh Circuit's opinion, the pool of firefighters does not reflect "qualified" persons for the position of engineer (the rank above firefighter) due to purportedly lowered standards for hire, then this pool cannot be considered the relevant labor pool for purposes of building a *prima facie* case for discrimination based on a statistical disparity in promotions to engineer.

This line of reasoning ignores the simple fact that the CFD instituted a hiring quota pursuant to the 1974 consent decree to increase minority representation in the rank of firefighter by purposefully increasing the number of *qualified* minority persons hired.[4] The increased minority representation in the position of firefighter achieved by the CFD was not achieved through lowered standards. Qualifications for hire remained as they were before the consent decree. The consent decree simply led the CFD to hire minority candi-

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[4]The 1974 Consent Decree (United States v. City of Chicago), paragraph 2 ("This long range goal and the interim hiring goal shall be subject to the availability of qualified black and Spanish surnamed applicants. . . . In no case shall defendant be required to . . . hire unneeded or unqualified employees in order to meet the goal, nor shall the City apply any standard for employment which does not validly measure qualifications required for the job of firefighter."), paragraph 4 ("[T]he City will make appointments of black and Spanish surnamed persons for the position of firefighter, from among qualified applicants . . ."), paragraph 5 ("In selecting from qualified applicants . . ."), and paragraph 6 ("In order to provide sufficient numbers of qualified black and Spanish surnamed applicants to meet the goals set forth . . . the city . . . shall contact community organizations and high schools with substantial minority enrollments, for the purpose of soliciting their help in informing minorities of employment opportunities in the Fire Department.").

dates at a higher rate than previously, if such candidates were qualified.

The Seventh Circuit's choice to dismiss the statistical disparity in racial composition between the ranks of firefighter and engineer was based not on this Court's guidelines as to the determination of the appropriate labor pool for comparisons in such cases, *see Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989), but instead on its own criteria for choosing a comparative pool. By hypothesizing that the labor pool was somehow tainted by earlier remedial actions to redress the effects of discrimination and thus irrelevant, *Billish*, 989 F.2d at 896, the Seventh Circuit in effect rendered any labor pool irrelevant. If the pool of firefighters is not relevant, then no labor pool is relevant, and no statistical disparity can be shown. Without such evidence, no predicate for affirmative action could exist.

The second instance of the Seventh Circuit's departure from established law and imposition of its own criteria for review occurred when the court approached the evidence by maneuvering between Title VII and equal protection analyses. *Id.* at 896-97. The Seventh Circuit was wrong to object to the CFD's remedial promotion policies for advancing minorities from lieutenant to captain. The court objected to these promotions on grounds that the CFD erred in concluding that the low level of minorities in the latter position was due to a legacy of discriminatory barriers to minority hiring prior to 1972. *Id.* at 896-97. The Seventh Circuit reached this conclusion by asserting that since Title VII did not come into effect until 1972, discriminatory hiring barriers to minorities prior to 1972 are "non-actionable," and thus cannot be used to bolster the CFD's contention that higher levels of minority representation would be seen in the ranks

of engineer, lieutenant and captain *but for* that pre-1972 "non-actionable" discrimination. *Id.* at 896-97.

However, it is clear that this case is an equal protection case under the Fourteenth Amendment, not a Title VII case. Under *Croson*, the CFD must have examined the history of its employment practices in order to implement race-based remedies, 488 U.S. at 495-500, and that history did not begin in 1972. Under the Fourteenth Amendment, actionable discrimination began when the Fourteenth Amendment was ratified by the states in 1868. The CFD recognized that the hiring policies implemented in 1974 for the rank of firefighter had, by the mid 1980's, resulted in a firefighter pool that was 29% minority. This minority representation would have been the true minority representation for all ranks at the CFD if the Department had never (prior to 1972) discriminated against minorities in the first place.[5] Thus, the CFD is completely correct to look at the discriminatory barriers to the hiring of minorities that existed before 1972, and the legacy of those barriers as manifest in the racial disparities that exist between the ranks as grounds for concluding that the disparity between minority representation in the rank of firefighter and the ranks of engineer, lieutenant and captain was a meaningful disparity.

A third instance of the Seventh Circuit's departure from established law is its analysis of the "narrow-tailoring" standard. *Croson* and *Paradise* established that one factor a

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[5] The CFD's approach appears to be consistent with statements articulated by Judge Posner. "[I]f minority firemen had been held back by . . . racially discriminatory tests, . . . so that they were lower on the career ladder than they would have been had the City never discriminated, the City would be free to depart from the rank order generated by the test results in order to correct the consequences of discrimination by putting things approximately where they would have been but for discrimination." *Billish v. City of Chicago*, 962 F.2d 1269, 1303 (7th Cir. 1992) (dissenting opinion) *vacated*, 989 F.2d 890 (7th Cir. 1993).

governmental body was to consider prior to implementing a race-based remedial measure was the existence of race-neutral measures. *Croson*, 488 U.S. at 507; *Paradise*, 480 U.S. at 171. The Seventh Circuit determined that utilizing unbiased tests, in compliance with the law currently, was a race-neutral measure that would obviate the need for other remedial measures. *Billish*, 989 F.2d at 897. This analysis of allowing current compliance to cure past discrimination is antagonistic to the Court's holding that affirmative action programs designed to remedy discrimination in a governmental body's hiring and promotional practices are legitimate. *Wygant*, 476 U.S. at 287; *Paradise*, 480 U.S. at 167. This analysis also contradicts the decision in *Paradise* that providing solely for race-neutral promotions prospectively "would have fallen far short of the remedy necessary to eliminate the effects of the Department's past discrimination." *Id.*, at 172-74.

The Seventh Circuit rejected the CFD's showing of a *prima facie* case for discrimination in its hiring and promotional practices, not through the application of a strict scrutiny analysis, but instead by imposing its own criteria for evidentiary review. *Billish*, 989 F.2d. at 895-97. This departure from precedent has not only jeopardized the well-crafted affirmative action program operated by the CFD, but places at risk all such programs nationwide. No government will be able to make a *prima facie* showing of discrimination pursuant to *Croson* if federal courts are allowed to conclude that any and all labor pools are irrelevant for purposes of statistical disparities on hypothetical grounds, and no program will be able to withstand a standard of review that fluctuates between Title VII and equal protection analyses. Nor will remedial programs survive the "narrow-tailored" review that limits remedial measures to current compliance. The Court has spoken clearly as to how evidence of disparities in hiring and promotion are to be approached by the courts, *Croson*, 488 U.S. at 500, 507; *Wygant*, 476 U.S. at

277, and other circuits have listened. This Court should remove any doubt that the approach created by the Seventh Circuit does not meet the standard that this Court has established.

C. Evaluation of the Narrow Tailoring of a Race-Based Policy Requires a Weighing of the CFD Policy's Remedial and Intrusive Effects

By the mid 1980's minority representation in the ranks of engineer and captain at the CFD had still not reached parity with the levels of minority representation in the relevant labor pool — the rank of firefighter. *Billish*, 989 F.2d. at 894, 896. The historical cause of this disparity was the CFD's discriminatory hiring practices, which were rectified in 1974 through implementation of hiring goals. *Id.* at 893. However, the contemporary cause and perpetuating mechanism for this disparity was the CFD's use of rank-order promotions based on racially-biased tests. All of the race-based remedial promotional policies implemented by the CFD were aimed solely at eliminating the effects of this mechanism of discriminatory promotional practices. And it is this fact that makes the strongest argument for finding that the CFD's promotional policies must pass this Court's second measure of constitutional review: the actions taken were narrowly tailored to correct only those discriminatory practices which were known to the CFD, and did not place undue burdens or hardships on nonminorities seeking promotional opportunities.

This Court has reached a clear definition of the meaning of narrow tailoring in the context of race-based remedial policies. In *Wygant*, this Court defined narrowly tailored policies to be those that remedy specific discriminatory practices but that "do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's

preference." *Wygant*, 476 U.S. at 287. In essence, this Court has reached an evaluative scheme for determining whether the affirmative action policies of a government are narrowly tailored. This scheme requires a court to weigh the remedial value of the policy in question against that policy's intrusion into the rights and protections of other individuals affected by those policies in order to determine whether a given policy is narrowly tailored. *Paradise*, 480 U.S. at 171.

Clearly, the CFD's policy of making out-of-rank-order promotions of black and Hispanic employees has a very high remedial value. Since it was the CFD's use of racially-biased tests to create rank ordering for purposes of promotion that was the mechanism that perpetuated disparities between the ranks in the first place,[6] the mitigation of the effects of these biased test-result rankings via the use of *some* non-rank-order promotions shows that the policy was narrowly tailored to remedy the effects of the discrimination at the CFD. The CFD's policy for remedying discriminatory promotional practices did not include actions that had no bearing on the cause of such practices. The high remedial value of this policy must then be weighed against its intrusion into the rights and protections of other individuals affected by this policy. *Id. at 182-83.*

Nonminority employees were never deprived of future opportunities for promotion as a result of the remedial actions taken by the CFD. First, the CFD attempted to implement a race-neutral test for promotions, which corresponds to this Court's decision that one factor which govern-

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[6]The 1980 settlement order implemented a race-based promotion remedy in order to increase minority representation in the higher ranks until ". . . new, validated promotion examinations . . ." could be developed and administered. *Billish*, 962 F.2d at 1282. The fact that these tests were, indeed, racially biased was established by the 1980 settlement order, which, "like a consent decree, was subject to judicial review and approval." *Id.*

ments should consider, prior to implementing race-based remedial measures, is alternative race-neutral remedies. *Croson*, 488 U.S. at 507. However, these attempts failed to correct the discriminatory barriers to promotion for minorities to the higher ranks. *Billish*, 962 F.2d at 1286-88. Only after failing to redress discrimination through race-neutral remedies did the CFD implement a race-specific promotional policy that included some out-of-rank-order promotions.

The out-of-rank-order promotions made by the CFD were not the only promotions made by the CFD under its race-based remedial promotional policy. The majority of promotions made were made in rank-order. *Billish*, 989 F.2d. at 892. Respondents contend that they would have been promoted sooner had all promotions always been made in rank-order. *Id.* at 892-93. Yet respondents do not (and cannot) contend that future promotions under the CFD's race-based remedial policy of mostly rank-order and some non-rank-order promotions would not have advanced them. In fact, since respondents remained higher on the rank-order listing after the latest round of promotions were made, they would likely be first to be promoted in the next round, since the CFD's race-based promotional policy always promoted those at the top of the rank-order listing first.

Moreover, respondents were never denied any positions in the CFD to which they had a vested right. *Billish*, 989 F.2d at 895. Since the tests used to rank the respondents were biased in their favor against the minorities who took the tests and were competing for these same promotions, the respondents' positions on the rank-order list cannot be viewed as being rightfully theirs. *Id.* at 895.

Therefore, since no future circumscription for promotion within the CFD has been enacted against these respondents (at most, these respondents were only delayed a promotion), and since no stripping of a vested right of these respondents

had occurred, the policy at issue did not unduly trammel their rights. Thus, the CFD's actions were of an only marginally intrusive nature.

These evaluations of the facts at hand are almost identical to the evaluations made by this Court in a very similar case — *United States v. Paradise* — in which this Court concluded that such actions were, indeed, not overly intrusive into the rights of nonminority employees. 480 U.S. 149, 177-86 (1987). If governments are to design race-based remedial programs they should be encouraged to create policies that resemble those which this Court has previously found to be narrowly tailored (such as *United States v. Paradise*). The policies implemented by the CFD clearly pass this Court's measure for a determination of narrow tailoring. The Seventh Circuit's decision in *Billish* failed to give consideration to both aspects of the policies at issue and instead dwelled on the question of intrusiveness. In its zeal to define all race-based policies aimed at eradicating barriers to minority advancement as being "reverse discrimination," the Seventh Circuit undermined the validity of government-operated affirmative action programs by casting aside precedent and concentrating on the supposedly over-intrusive nature of the policies. Its approach does not comport with this Court's deference to the validity of such programs, *see Croson*, 488 U.S. at 491-92; *Wygant*, 476 U.S. at 287; *Paradise*, 480 U.S. at 166-67; nor does it match the more careful and complete analyses given to such policies by other federal courts.

III.

CONCLUSION

For the foregoing reasons, the National Urban League and Chicago Urban League support the petition of the City of Chicago for a *writ of certiorari* to the Seventh Circuit and reversal of the ruling below.

Respectfully submitted,

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